UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **JIAQIANG XU,** **Defendant.**	**16 Cr. 10 (KMK)**

DEFENDANT JIAQIANG XU'S MOTION TO COMPEL DISCOVERY

Defendant Jiaqiang Xu respectfully moves this Court to compel the government to produce materials pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Defendant Xu asks this Court to require the United States to produce:

1. Any report, summary, document or information showing that the code Defendant Xu provided either in emails to the FBI or in uploads to a server did not contain IBM source code or other trade secrets;
2. Any report, summary, document or information showing that some portion of the GPFS code is open source code;
3. Any report, summary, document or information showing that Defendant Xu told undercover FBI agents that he was not willing to sell the GPFS source code; and
4. Any report, summary or comment by the FBI or the United States Attorney's Office suggesting that there was some concern during the investigation of this matter as to whether Defendant Xu had trouble understanding or communicating with the FBI agents, either in their undercover capacity or after Defendant Xu was arrested.

FACTUAL BACKGROUND

Defendant Xu is a Chinese citizen who was employed by IBM in China from November 2010 until May 2014. Complaint, Dkt. No. 1 ("Compl.") at ¶ 7(a). While at IBM, Defendant Xu worked to make repairs to the General Parallel File System ("GPFS"), including by repairing problems with the underlying source code. GPFS is a "clustered file system [that] facilitates faster computer performance by coordinating work among multiple servers." *Id*. at ¶ 3. According to the Complaint, IBM does not sell the source code or otherwise make it available to its customers. *Id*. at ¶ 5. Defendant Xu believes that some portion of this source code, however, is open source, meaning it is available to the public and cannot be claimed as a trade secret.[1]

In 2014, the FBI allegedly received a report that Defendant Xu gave GPFS source code to someone.[2] *Id*. at ¶ 8. The FBI immediately began an undercover

[1] Publicly available information supports Defendant Xu's belief. IBM's own website, for example, has a detailed description of the GPFS structure. One section, entitled "The GPFS open source portability layer" explains that "source code is provided for the portability layer so that the GPFS portability can be built and installed on a wide variety of Linux kernel versions and configuration." http://www.ibm.com/support/knowledgecenter/SSFKCN_3.5.0/com.ibm.cluster.gpfs.v3r5.gpfs300.doc/bl1ins_gplmods.htm, attached as Exhibit A.

[2] Defense counsel is unaware of the exact date that the informant contacted the FBI because the government has not provided Xu with any further information about this informant's report. In the criminal complaint filed in this case, the government alleged that the FBI learned that Defendant Xu had claimed to have access to the

investigation. An undercover FBI agent contacted Defendant Xu in November 2014, posing as a representative of a company that wanted to hire him to build a data storage platform. *Id.* at ¶ 9. The undercover agent communicated with Defendant Xu for about a year via email and Skype. During these communications, the undercover agent offered to bring Defendant Xu to the United States, give him a job building a data storage platform, and (later) pay him for stolen GPFS source code. Despite the undercover agent's repeated requests that Defendant Xu set a price for the code, Defendant Xu never did so.

At one point, the undercover agent asked Defendant Xu to provide an example of his coding style. Defendant Xu did that by sending the undercover agent an email on March 16, 2015 that contained three very small segments of code that he had written. *Id.* at ¶10. The government has claimed that the email included "proprietary [IBM] material that related to the [GPFS] code" but does not claim that it contained the source code at issue in the superseding indictment. *Id.* at ¶ 11. The government makes this claim based on information allegedly obtained from an employee at IBM. *Id.* From the limited information provided by the government in discovery,

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source code and was using it in business ventures unrelated to IBM. Compl. at ¶ 8. But, in a subsequent interview, the case agent alleged that Defendant Xu sent the source code to an individual. To the extent the alleged informant provided any material favorable to Defendant Xu's guilt or punishment, he seeks production of reports regarding the information that the informant provided. And, if no such informant actually existed, Defendant Xu seeks that information in order to analyze and pursue a motion to suppress under *Franks v. Delaware.*

Defendant Xu believes that the IBM employee concluded that the small code fragments that Defendant Xu emailed did not contain the proprietary source code. The government, however, has refused to produce this document or any other report regarding its analysis of the code fragments. Defendant Xu requests this information so that he may prepare his defense.

In August 2015, the undercover agent asked Defendant Xu to upload files from China to the United States. The undercover agent claimed that he needed to see Defendant Xu's capabilities before moving forward with the job offer. Not knowing that he was speaking to the FBI, Defendant Xu did so. The FBI asked IBM to review the files that Defendant Xu uploaded. The IBM employee apparently concluded that the "only GPFS source code found on the server was the open source portion of the code." *See* September 21, 2015 Report of IBM Employee, filed under seal as Exhibit B. In other words, Defendant Xu did not send the source code at issue in this case. Defendant Xu believes that he is entitled to any and all internal communications within the FBI as well as any communications between the FBI and IBM about the fact that the code Defendant Xu provided at any time was not proprietary IBM source code.

In December 2015, the undercover agent convinced Defendant Xu to come to the United States so that he could meet other members of the fictitious company. The FBI obtained a visa for him, paid for his ticket, and brought him to New York.

During the first meeting in the United States, the undercover agent repeatedly asked Defendant Xu to name a price at which his company could buy the GPFS source code. Defendant Xu refused to sell it, saying that he could not sell or otherwise distribute the source code to the undercover agent. (As explained above, Defendant Xu had also refused to set a price for the code during previous conversations when the undercover agent asked him to do so.)

Defendant Xu attended a second meeting later that day. This meeting included the undercover agent with whom he had been speaking and another undercover agent posing as the owner of the fictitious company that wanted to buy the source code. During the second meeting, the primary undercover agent acknowledged that Defendant Xu did not want to sell the code. At that point, the FBI switched tactics, trying to get Defendant Xu to name companies to which he had allegedly delivered software made from stolen source code. Defendant Xu believes that he is entitled to the internal communications within the FBI acknowledging that throughout the investigation he refused to sell or distribute the source code and that the FBI changed its investigative tactic as a result.

After the second meeting, the FBI arrested Defendant Xu. Two FBI agents interviewed him later that day. The interview was video recorded. During the course of the interview (which lasted no more than 45 minutes) the agents repeatedly remarked that Defendant Xu was having trouble communicating with them. At one point, an agent re-read him his *Miranda* rights because he was concerned that Defendant Xu had not understood them at the start of the interview. (The initial *Miranda* warning was not recorded. Apparently, the agents started the video recorder after the initial warning.) Eventually, the agents decided to stop the interview until they could obtain the assistance of a Chinese interpreter.

It is shocking that the agents conducting the interview realized that Defendant Xu did not understand them within minutes of speaking with him while the undercover agent raised no such concerns despite lengthy Skype calls and in-person meetings. Defendant Xu contends that the United States must be required to produce any information showing or suggesting that Defendant Xu was having trouble communicating with agent(s) ***at any time*** during the course of the undercover investigation or the subsequent interview. Defense counsel has requested this information but the government has refused to provide it, stating that it will not produce "information constituting opinions about whether the defendant had trouble understanding or communicating with the undercover agents." *See* Letter dated August 12, 2016 to Mike Brown ("Government Letter"), attached as Exhibit C at 2.[3]

[3] The government also contends that it is unaware of any such information but – given the government's belief that it is not required to produce this information – Defendant Xu seeks an order from the Court requiring the government to search for and produce this information.

On January 5, 2016, the government obtained an indictment against Defendant Xu, charging him with one count of theft of trade secrets. Dkt. No. 4. On June 14, 2016, the government obtained a superseding indictment against Defendant Xu, charging him with three counts of economic espionage in violation of 18 U.S.C. §1831 and one count of theft of trade secrets, distribution of trade secrets, and possession of trade secrets, all in violation of 18 U.S.C. § 1832. Dkt. No. 15.

On August 8, 2016, Defendant Xu asked the government for specific reports concerning the analysis of the code that Defendant Xu emailed to the undercover agent on March 16, 2015, and the code that Defendant Xu uploaded to the servers in early August 2015. Defendant Xu explained that, to the extent the reports contain information suggesting that Defendant Xu had not emailed or uploaded GPFS source code or they contain any other information helpful to the defense, those reports must be produced pursuant to *Brady v. Maryland.* Defendant Xu also requested internal reports and information confirming that the FBI was aware that Defendant Xu was having trouble communicating with the undercover agent. As explained above, the government refused to produce this information.

The government has provided three FBI 302 reports in discovery thus far. These reports are all one-page summaries relating to Defendant Xu's arrest and initial appearance. The government has not produced a single additional report, indicating that no report contains any information that is helpful to Defendant Xu on the issue of guilt or punishment. It is almost impossible to believe that the FBI 302 reports do not have a single bit of *Brady* or *Giglio* information given that Defendant Xu said he could not sell the source code, refused to name a price for the code, had enormous difficulty communicating with the agents, and that the source code itself contains open source code. Defendant Xu asks that the Court order the government to produce any and all *Brady* information in addition to the four items specifically enumerated herein.

ARGUMENT

The Due Process Clause of the United States Constitution, as well as *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 403 U.S. 150 (1972), require the government to produce any evidence that is materially favorable to the defendant either as substantive evidence or as impeachment evidence. "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998) (internal citation and quotation omitted). Here, the government is improperly taking a narrow view of its discovery and *Brady* obligations. Defendant Xu, therefore, requests that the Court order the government to produce the categories of documents identified in this Motion, as well as any other *Brady* material.

A. Documents concerning Defendant Xu's March 16, 2015 email to undercover agents and reports about the code uploaded to the servers in early August.

As mentioned above, the discovery materials provided so far discuss an IBM employee's evaluation of an email sent by Defendant Xu on March 16, 2015 attaching snippets of code. According to the Complaint, the IBM employee said that the email included "proprietary material that related to the GPFS Code," (Compl. at ¶ 11), but did not claim that the snippets were proprietary source code. If the IBM employee's analysis says that any portion of the code patches sent by Defendant Xu were open source GPFS materials or that they included proprietary material to IBM but not the actual source code (the only alleged trade secret in this case), then that report contains exculpatory information.

Indeed, the government should provide the IBM employee's analysis to Defendant Xu even if the employee concluded that it contained some portion of the source code. So long as the United States intends to introduce evidence that Defendant Xu sent the code fragments to the undercover agent, Defendant Xu should be provided the IBM employee's analysis and any discussion of it. Without this information, Defendant Xu cannot prepare his defense to allegations arising from the emailed code. He cannot, for example, hire an expert witness to rebut the likely testimony of the IBM employee about his analysis of the code. Nor can he establish his defense that the code he emailed posed no danger to IBM or financial benefit to the undercover agent – as the government is required to show in a theft or trade secrets case.

Similarly, the government has produced a report showing that an IBM employee determined that the code Defendant Xu uploaded to the servers contained only open source code. The government, however, has not produced other documents discussing this fact. For the same reasons set forth above, Defendant Xu contends that he should be entitled to other documents, reports, or communications either because they contain *Brady* material or – assuming the government intends to introduce evidence of the uploads – to prepare his defense to the allegations against him.

B. Any report regarding the open source portions of the source code.

When an individual or company purchases a license for GPFS software, they are given access to portions of the source code that are open source. *See* Exhibit A. The IBM website explains that "[s]ource code is provided for the portability layer so that the GPFS portability can be built and installed on a wide variety of Linux kernel versions and configuration." *Id*. Defendant Xu requests that the government produce any report where the open source portion of the source code is mentioned, including any reports commenting on Defendant Xu's references to the open source code.

This request is especially important due to the nature of a trade secret case. To qualify as a trade secret under 18 U.S.C. § 1839, the government must show that (1) the information is owned by the entity claiming it as a trade secret; (2) the information is actually secret in that it is not generally known to, nor readily ascertainable by, the public; (3) the owner of the information took reasonable measures to keep the information secret; and (4) the information has independent economic value because it is secret (i.e., not generally known to or ascertainable by the public). Further, to demonstrate a violation under 18 U.S.C. section 1832(a), the government must prove that (1) the owner of the information did not consent to the defendant taking, copying, or possessing the information; (2) the defendant knew the information was a trade secret; (3) the defendant intended to convert the trade secrets to the benefit of someone other than the owner of the information; and (4) the defendant intended or knew that her actions would injure the owner of the information.

The fact that a portion of the source code is open source calls into question a number of these elements. The open source portion of the code is certainly ascertainable by the public, and therefore does not have independent economic value. It also casts doubt on whether anyone would know that the source code is a trade secret since a portion of the code is available to the public. Any report that discusses the open source nature of the code is exculpatory and must be produced pursuant to *Brady*.

C. Any report referencing Defendant Xu refusing to sell the source code.

During numerous discussions, the undercover agents explained that they wanted Defendant Xu to help create a new, open source data storage program in the United States. They explained that they wanted something "customized" and "homegrown" and that they wanted Defendant Xu to design this new program for their company. In addition, Defendant Xu repeatedly refused to sell source code to the undercover agents. Throughout the investigation, he refused to set a price for the code, despite the undercover agent's repeated requests that he do so. During the morning meeting that took place in White Plains, New York on December 7, 2015, Defendant Xu plainly stated to the undercover agents that: "I cannot propagate the code." Transcript of 12/7/2015 Morning Meeting at 32, attached as Exhibit D. Defense counsel believe there must be reports showing or documenting the fact that, throughout the investigation, Defendant Xu refused to sell the source code. Any such report would contain exculpatory information and must be produced pursuant to *Brady*.

Moreover, it was clear that – by the time of the second meeting – the FBI changed its tactic. The undercover agent plainly stated that he knew Defendant Xu did not want to sell the source code. Rather than trying to buy the code, the undercover agents asked repeated questions about customers to whom Defendant Xu had provided data storage solutions. Again, reports showing or discussing this change in tactic should be produced.

D. Any report discussing Defendant Xu's understanding of English during his conversations with FBI agents.

Xu was born in China and primarily speaks Mandarin. He lived in the United States for three years while attending graduate school and learned English as a second language. He has not lived in the United States or spoken English on a regular basis since at least 2010. Defense counsel is concerned that, while Defendant Xu can passably communicate in English, he often has difficulty comprehending everything that is said during a conversation. Defense counsel believes that the FBI agents, Assistant United States Attorneys, and/or other government representatives must have had similar concerns throughout their investigation. After all, the interviewing agents recognized Defendant Xu's inability to communicate with them very early in the interview. The government has refused to "provide information constituting opinions about whether the defendant had trouble understanding or communicating with the undercover agents." Government Letter at 2. They did however, note that "we are not concerned that the defendant had such trouble." *Id.* Defense counsel is unable to determine from the government's representation if there are no reports discussing Defendant Xu's difficulty in communicating or understanding the FBI agents or if the Assistant United States Attorneys do not think that he had trouble communicating.

Again, it is difficult to believe that there are no FBI reports, documents, or notes regarding Defendant Xu's difficulty communicating in English considering that the two Special Agents who conducted Defendant Xu's post-arrest interview commented during the interview that "I think there is a language barrier, a little bit," (Video of Post-Arrest Statement at 28:04), and eventually stopped the interview in order to get a translator "because it seems maybe you're not understanding some of the questions that Agent Altimari is asking you." *Id*. at 45:08. The government has not produced any report documenting the agents' concerns that Defendant Xu could not understand their questions. Defense counsel believes that, over the course of a year-long undercover investigation, there are likely other references in FBI or other reports regarding Defendant Xu's difficulty communicating in English. A report showing that Defendant Xu may not have understood the entirety of the conversation while communicating with the FBI is exculpatory and must be produced pursuant to *Brady*.

CONCLUSION

Defendant Jiaqiang Xu respectfully moves the Court to compel the government to provide:

1. Any report, summary, document or information showing that the code Defendant Xu provided either in emails to the FBI or in uploads to a server did not contain IBM source code or other trade secrets;
2. Any report, summary, document or information showing that some portion of the GPFS code is open source code;
3. Any report, summary, document or information showing that Defendant Xu told undercover FBI agents that he was not willing to sell the GPFS source code; and
4. Any report, summary or comment by the FBI or the United States Attorney's Office suggesting that there was some concern during the investigation of this matter as to whether Defendant Xu had trouble understanding or communicating with the FBI agents, either in their undercover capacity or after Defendant Xu was arrested.

Respectfully submitted this 26th day of August, 2016.

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LOCAL RULE 16.1 CERTIFICATE OF COMPLIANCE

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that defense counsel has conferred with counsel for the government in an effort in good faith to resolve by agreement the issues raised by this Motion without the intervention of the Court and has been unable to reach agreement.

/s/ Michael Brown
Michael Brown
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which automatically notifies all counsel of record.

/s/ Michael L. Brown
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